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KEJORA RESOURCES SDN BHD v. CHUBB INSURANCE MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[ADMIRALTY IN PERSONAM NO: WA-27NCC-38-08-2022]
8 APRIL 2025

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Abstract – *The materiality of the breach of warranty is immaterial for consideration in respect of a claim that arises subsequent to the breach of the warranty. Once there is a breach of warranty, the insurer's discharge from liability is automatic and not at all dependent upon any decision by the insurer to treat the contract as at an end. A direct causal link between the breach and the ultimate loss is not required, that is, the relevant test is not whether the non-compliance actually caused or contributed to the loss which had been suffered. The test is whether there was a breach of warranty. If there is, the insurer could not be liable to the policy holder on the claim. There could be no claim that is payable by the insurer on the policy in respect of liability arising post the breach.*

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INSURANCE: *Policy – Indemnity – Marine insurance – Claim – Repudiation – Insurer provided insurance coverage to insured in respect of hull and machinery, including perils of sea – Port main engine of tug encountered sudden overspeed – Port main engine of tug exploded – Tug underwent damages inspection and repair works – Insured's claim for bill being costs and charges incurred for repair works on port main engine – Insurer rejected insured's claim – Whether insurer breached terms of policy when it failed and/or refused to indemnify insured – Whether insurer entitled to repudiate claim under policy – Whether there was breach of warranty*

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The plaintiff was the registered owner of the tugboat Kejora Prosper. The defendant had provided insurance coverage in respect of hull and machinery, including perils of the sea, for the period of 12 months, commencing on 1 December 2017. Upon the expiration of the initial policy, the defendant issued a renewal schedule for the policy, renewing the coverage for another 12 months, from 1 December 2018 to 30 November 2019, for hull and machinery for the sum of RM12,439,725.20. On 25 May 2019, the following transpired on board the tug: (i) the port main engine of the tug encountered a sudden overspeed; (ii) the master on board the tug tried to stop the port main engine of the tug by pushing the emergency stop button located at the bridge but it was unsuccessful; and (iii) the then Chief Engineer rushed down to the engine room to stop the port main engine of the tug locally but when he reached the engine control room and opened the door, the port main engine of the tug exploded. The tug subsequently underwent damage inspection and repair works. The plaintiff then submitted the claim for bill for SGD1,402,589.25 (or RM4,238,905.23), which was the costs and

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charges incurred for the repair works of the port main engine. The defendant rejected the plaintiff's claim. Hence, the present suit by the plaintiff. The plaintiff claimed that the defendant had breached the terms of the policy when it failed and/or refused to indemnify the plaintiff for the claims submitted. The defendant, on the other hand, contended that it was entitled to repudiate the plaintiff's claim under the policy as: (i) it had no obligation to pay the plaintiff for its claims under the policy when the plaintiff failed to 'properly and reasonably maintained, equipped, kept-up, officered and manned (the tug) during the currency of the policy'; and (ii) there was an implied duty to exercise due diligence on the part of the plaintiff under the said warranty which the plaintiff had breached, as evidenced by the lack of instructions and supervision by the plaintiff of its crew, as well as the poor maintenance of the tug by the plaintiff. In particular, the defendant referred to the fact that there was no proper handover when there was a change of the chief engineer of the tug sometime in May 2019.

Held (allowing claim):

(1) The natural and ordinary meaning of the words 'properly and reasonably maintained, equipped, kept-up, officered and manned' was that the scope of the warranty was confined to the obligations by the plaintiff to timely and adequately maintain the tug, including repairs, inspections with the maritime industry standards and to ensure that the tug carried all necessary equipment in working order needed for the operation of the tug and required by law and industry practice. The tug and her equipment must be kept in operational readiness and was sufficiently officered and manned by properly certified and competent personnel. (para 52)

(2) According to the main engine running hours log record, as at the time of the explosion on 25 May 2019, the vessel's port side main engine had an average of 19,492 running hours since its last overhaul in July 2016. Thus, based on the maintenance records, the port side main engine had already exceeded the engine maker's requirement of 15,000 running hours. The following facts were not disputed: (i) the plaintiff did not overhaul the engine when the 15,000 running hours was exceeded; and (ii) the engine had 19,492 running hours between its last overhaul and the date of the incident. (paras 54 & 55)

(3) The warranty to 'properly and reasonably maintain' the tug, which must necessarily include the engine, meant that the plaintiff must take care of the engine in a manner that a prudent owner or operator would, ensuring that it remains in good working condition. In this regard, there was no necessity of an absolute compliance of the requirement, which would otherwise be the case if the warranty stated that the plaintiff would overhaul the engine, in compliance with the Niigata Service Manual. Whilst the manufacturer's recommended overhaul schedule was a good

indication of what was considered as proper maintenance, a failure to follow strictly did not automatically mean that the warranty was breached. (paras 75 & 76)

(4) The defendant, who was seeking to rely on the warranty, bore the burden of proof to satisfy the court that the plaintiff had breached the warranty. By merely establishing that the port side main engine had exceeded 15,000 +/- running hours at the time of the incident, without more, did not meet the test that, on the balance of probabilities, the plaintiff had breached the warranty to properly and reasonably maintain the tug. (para 85)

(5) There was nothing in the warranty requiring the plaintiff to ensure that there would be a proper and supervised handover, let alone one that was in accordance with a standard required of a vessel subject to the International Safety Management ('ISM') Code. Under the ISM Code, there was heavy emphasis on documented procedures. However, the same may not be applicable at all for vessels below 500 gross tonnage and based on the prevailing industry standards in Malaysia. Due to the doctrines of absolute compliance and automatic discharge, relating to the breach of warranty in a marine insurance, the scope of the promissory obligation that required absolute compliance must be narrowly construed and any ambiguity in the warranty clause must also be construed against the insurer in accordance with the *contra proferentem* rule. Thus, if the defendant wanted the plaintiff to put in place a proper handover report and protocol, the defendant should have clearly provided so in the warranty. (paras 102 & 103)

(6) There had indeed been a breach of the policy by the defendant. The defendant was to pay the plaintiff the sum of RM4,238,905.23 as indemnity under the policy. (paras 113 & 114)

Case(s) referred to:

De Hahn v. Hartley [1786] 1 TR 343 ***(refd)***

Eridania SpA v. Cia Emiliana De Exportacion SA & Ors & Another Case, The Fjord Wind [2000] EWCA Viv 184 ***(refd)***

Newcastle Fire Insurance Co v. Macmorran & Co [1815] 3 Dow ***(refd)***

Suhaimi Ibrahim v. United Malayan Insurance Co Ltd [1965] CLJU 170; [1965] 1 LNS 170 HC ***(refd)***

The Good Luck [1992] 1 AC 233 ***(refd)***

Youell v. Bland Welch & Co Ltd [1992] Lloyd's List Law Reports (1951-) (Lloyd's Rep) 127 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 5

Marine Insurance Act 1906 [UK], ss. 5, 33(1), (3), 34, 35

For the plaintiff - Satharuban & Mishalini Rajasegaran; M/s Satha & Co
For the defendant - Arun Krishnalingam & Aaron Siva; M/s Sativale Mathew Arun

Reported by Lina E

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] This suit is filed by the plaintiff as the assured against the defendant following the defendant's repudiation of the plaintiff's claim for its loss arising from the damage to the port side main engine onboard the plaintiff's tug, Kejora Prosper ('the Tug' or 'Kejora Prosper') which exploded on 25 May 2019.

[2] The plaintiff is basing its claims against the defendant as the insurer under the Chubb Marine Hull Policy No. HQ-H0010623-HHM and its Renewal Schedule Policy No. HQ-H0010623-HHM-R001 (collectively referred as 'the policy'). The plaintiff claims that the defendant has breached the terms of the policy when it failed and or refused to indemnify the plaintiff for the claims submitted.

[3] The defendant, on the other hand, contends that it has no obligation to pay the plaintiff for its claims under the policy because the plaintiff has breached the warranty to "properly and reasonably maintained, equipped, kept up, officered and manned (the tug) during the currency of the policy". More specifically, the defendant contends that the plaintiff had breached the aforesaid warranty when it failed to overhaul the port side main engine of Kejora Prosper when it reached the 15,000 running hours mark +/- 20% as stipulated by the manufacturer of the engine.

[4] The defendant further contends that there was an implied duty to exercise due diligence on the part of the plaintiff under the said warranty which the plaintiff had breached as evidenced by the lack of instructions and supervision by the plaintiff of its crew as well as the poor maintenance of the tug by the plaintiff. In particular, the defendant refers to the fact that there was no proper handover when there was a change of the Chief Engineer of the tug sometime in May 2019.

[5] The aforesaid lack of due diligence, according to the defendant is a breach of the warranty which entitles the defendant to repudiate the plaintiff's claims under the policy.

[6] This judgment deals with the significance of a warranty in the contract of marine insurance and the interpretation and scope of the warranty to "properly and reasonably maintained, equipped, kept up, officered and manned (the tug) during the currency of the policy".

Background Facts

[7] The plaintiff is the registered owner of the tugboat Kejora Prosper (IMO: 9501485), sailing under the Malaysian flag.

[8] By the Chubb Marine Hull Policy No. HQ-H0010623-HHM, issued on 11 January 2018, the defendant provided insurance coverage in respect of Hull and Machinery, including perils of the sea, for a period of 12 months commencing on 1 December 2017 ('the initial policy').

[9] Upon the expiration of the initial policy, on 2 January 2019, the defendant issued a renewal schedule for the policy, Policy No. HQH0010623-HHM-R001, renewing the coverage for another 12 months, from 1 December 2018 to 30 November 2019 ('the renewed policy'). The renewed policy provided insurance coverage for Hull and Machinery for the sum of RM12,439,725.20.

[10] On 25 May 2019, the following transpired on board the tug:

(i) while the tug was at West Port Berth 10 assisting to push and hold a container vessel, MV Cape Fawley, the port main engine of the tug encountered a sudden overspeed;

(ii) the master on board the tug tried to stop the port main engine of the tug by pushing the emergency stop button located at the bridge, but it was unsuccessful;

(iii) the then Chief Engineer, Mr Yulianto rushed down to the engine room to stop the port main engine of the tug locally, but when he reached the engine control room and opened the engine control room's door, the port main engine of the tug exploded; and

(iv) once the smoke in the engine control room had reduced, the Chief Engineer inspected the port main engine of the tug and discovered damages to the engine cylinder no. 1, crankcase, connecting rod, crank pin bearing and other parts of the tug.

[11] The tug was subsequently sailed to Singapore and on 27 May 2019, the tug arrived at Boskalis SMIT Shipyard for damage inspection and repair works.

[12] On 5 September 2019, the repair works on the main engine of the tug were completed and the tug successfully underwent sea trial on 8 September 2019 and bollard pull on 12 September 2019.

Investigation Into The Cause Of Explosion

[13] Pursuant to the damage and the repair works, the plaintiff carried out its own investigation to probe the cause of the damage to the tug. The following are the finding of facts:

(i) sometime in early May 2019, in the course of ordinary business, Mr Hermansyah, the then Chief Engineer on duty on board at the tug, carried out inspection on the governor of the port main engine of the tug. The governor is a device that regulates the engine's speed by controlling

the fuel supply. It ensures the engine operates at a steady and safe revolutions per minutes or RPM to prevent overspeeding or slowing down under varying loads;

(ii) while carrying out his routine inspection, Mr Hermansyah realised and noticed the following:

(a) that there was an abnormal hunting on the governor of the port main engine of the tug; and

(b) that there were some clearances (*ie*, small gaps or free play between the mechanical components) on the governor's linkage arrangement of the tug (the linkage arrangement connects the throttle, governor and fuel injection system to regulate the engine power and speed);

(iii) Mr Hermansyah then decided to fix a Jubilee Clip on the governor's linkage arrangement as a temporary measure to secure and ensure the smooth functioning of the tug;

(iv) upon physical inspection of the Jubilee Clip used, it was found to be slightly rusty at the time of fixing. However, Mr Hermansyah proceeded to use the Jubilee Clip to the governor's linkage arrangement because it was the only Jubilee Clip with that specific size available on board the tug;

(v) after Mr Hermansyah fixed the Jubilee Clip on the governor's linkage arrangement, the hunting or overspeeding on the governor of the port main engine of the tug reduced drastically;

(vi) Mr Hermansyah decided that the governor would be operating in a safe and satisfactory condition. Mr Hermansyah however failed and or omitted to report to the Master on board of the tug or to the tug's technical superintendent that a Jubilee Clip was fixed to secure the governor's linkage arrangement; and

(vii) the daily operations of the tug continued without any service disruption. Thereafter, the Mr Hermansyah signed off on 24 May 2019 and returned to Indonesia.

Claim Submission To The Defendant

[14] On 25 May 2019, the plaintiff, through SAG Global Solutions Sdn Bhd ('the defendant's agent' or 'SAG'), submitted a notice of claim under the policy to the defendant regarding the damage to the tug.

[15] Subsequently, the defendant appointed Maphilindo-Insight Sdn Bhd ('the defendant's surveyor' or "Maphilindo") to conduct survey and adjusting works pertaining to the claim on the policy. All relevant documents sought by the defendant's surveyor which were in possession of the plaintiff were provided by the plaintiff to the defendant and or the defendant's surveyor.

[16] On 14 January 2020, the plaintiff submitted the claim bill for SGD1,402,589.25 or RM4,238,905.23 (based on the currency exchange stated in the renewed policy), which was the costs and charges incurred by the plaintiff for the repair works of the port main engine. For the purpose of this action, the quantum of the plaintiff's loss is not in dispute.

The Defendant's Response And Claim Rejection

[17] On 29 June 2020, the defendant's claims unit head informed the plaintiff that the claim could not be considered, citing the lack of evidence of negligence by the Chief Engineer and the application of the Institute Additional Perils Clause, which excludes coverage for damage resulting from the plaintiff's lack of due diligence.

[18] Subsequently, after continuous correspondence between the defendant's claims unit head and the defendant's agent, Mr Mah Weng Yip, on 20 October 2020, the defendant issued a repudiation letter rejecting the claim ('the repudiation letter') for the following reasons:

(i) that it was known to the plaintiff during the initial inception of the initial policy that the initial policy contains an express warranty stating as follows:

> Warranty Vessel hereby insured is properly and reasonably maintained, equipped, kept up, officered and manned during the currency of the policy. In the event of loss, the survey report issued by the corporation's approved surveyor shall be taken as evidence insofar as to whether this Warranty has been observed.

(ii) that according to the defendant's surveyor's report dated 20 June 2020, there was a breach of warranty as the plaintiff had failed to comply with the engine manufacturer's service requirement to overhaul the engine within 15,000 running hours of the last overhaul, which is sometime referred to as the time between overhaul interval ('TBO');

(iii) that based on the tug's engine log, at the time of last overhaul of the engine in July 2016, the port main engine of the tug's running hours was approximately 21,729 hours;

(iv) that the port main engine of the tug would have been due for overhaul around September to October 2018 and there was no evidence that the port main engine of the tug was overhauled at that time or any time before October 2018. This according to them, was a clear breach of the warranty;

(v) that pursuant to s. 33 of the Marine Insurance Act 1906, the initial policy had become void due to the breach of warranty in October 2018. As such, it could not have been renewed in December 2018;

(vi) alternatively, that the renewal of the initial policy failed due to the breach of warranty as the port main engine of the tug was still not overhauled at the time of the renewal of the initial policy. As such, the renewal policy was null and void;

(vii) that the claim is not payable due to the lack of due diligence by the plaintiff as owners and/or their managers in the management and supervision of the crew and the tug;

(viii) that any claim under cl. 6.2.2 and cl. 6.2.3 of the Institute Time Clause fails due to the lack of due diligence by the plaintiff as owners and/or their managers;

(ix) that the plaintiff as owners and or their managers failed to:

(a) monitor the running hours of the engine;

(b) implement a system of management to ensure that the running hours and performance of the main engine and governor would be recorded, supervised and acted upon;

(c) ensure that the engine was overhauled in accordance with the manufacturer's requirements;

(d) have in place a system of instructions and supervision to ensure that the crew would only make repairs to the vessel and its machinery in accordance with the manufacturer's criteria; and

(e) that the port main engine would not have been damaged as a result of overspeed as the governor linkage and spring pin would have been inspected and the use of the Jubilee Clip would have been corrected if the plaintiff as owners and or their managers had conducted the necessary due diligence.

[19] On 25 January 2022, the plaintiff's solicitors replied to the repudiation letter denying all allegations and stated, *inter alia*, that the contention that there was a breach of warranty which warrants the policy becoming void and or the renewal of the initial policy null and void is baseless and unwarranted. Pursuant to the plaintiff's internal investigation, the damage to the tug was caused by the negligence of the duty Chief Engineer at the material times, Mr Hermansyah.

[20] The plaintiff contends that the defendant has breached the terms of the policy by:

(i) failing to indemnify the plaintiff for the damage to the tug under the renewed policy;

(ii) ignoring repeated requests for claim consideration and failing to adequately assess the claim; and

(iii) wrongfully rejecting the claim for loss and damage to the tug under the renewed policy.

[21] As a result of the defendant's breach of the policy, the plaintiff has suffered financial loss and damage in the sum of SGD1,402,589.25 (equivalent to RM4,238,905.23 at the exchange rate of SGD3.0222), being the amount paid for the repair works to the port main engine of the tug.

[22] Accordingly, the plaintiff claims that the defendant is liable to indemnify the plaintiff for the said amount under the terms of the renewed policy.

Issues For Determination

[23] The primary issue for determination in this suit is:

> Whether or not the Defendant is right in repudiating the Plaintiff's claim pursuant to the Policy *via* the Repudiation Letter?

[24] In determining the primary issue, the following supplementary issues will be examined:

(i) whether it was necessary for the plaintiff to comply with the engine manufacturer's service manual requirement to overhaul the engine within 15,000 running hours +/- 20% of the last overhaul? In this regard, whether the overhaul of the port main engine at every 15,000 running hours +/1 20% a mandatory requirement by the engine manufacturer or merely a guideline or recommendation by the engine manufacturer?

(ii) if the plaintiff did breach the requirement of the engine manufacturer's service manual to overhaul the port main engine, whether this amounts to a breach of the express warranty by the plaintiff that the tug "is properly and reasonably maintained, equipped, kept up, officered and manned during the currency of the policy";

(iii) whether the scope of the warranty covers the lack of due diligence, lack of instruction and lack of supervision by the plaintiff of their crew, including ensuring a proper handover when there is a change of crew and if so, whether such duty of due diligence was breached; and

(iv) whether Maphilindo's Report dated 12 June 2020 conclusively found that the lack of due diligence by the plaintiff was the cause which had resulted in the overspeed and damage to the port main engine on 25 May 2019 and could to be taken as conclusive and final evidence by the defendant to repudiate the plaintiff's claim?

Court's Considerations

Cause For The Explosion To Engine

[25] It is undisputed that the explosion occurred as a result of the overspeeding of the port side main engine. What was in dispute, however, was the probable cause for the overspeeding.

[26] PW7, the plaintiff's expert witness opined in his report that the overspeed of the engine was due to the dislodged governor linkage.

> 2. It is evident that the overspeed was due to dislodged governor linkage to the fuel pump control rack. As the thread of linkage is partially sheared off at the end, this would indicate that the linkage would have initially become loose with minimal thread was left for contact with the ball joint and when the Master had increased the speed from bridge, the force exerted would have caused the partially shearing off of the thread part, thus disengaging the Governor from the fuel rack and leading to the overspeed of the engine.

[27] PW7, again, confirmed during cross-examination that the incident (the overspeed) was caused due to the failure (worn/shear) of the governor linkage.

AK So, by your evidence, the fact that the engine was hunting in May 2019, would in your opinion be evidence of there being a weakness in the governor linkage, wouldn't there?

DOMNIC Yes

AK Now, I'm going to put it to you that the reason for the weakness in the governor linkage was because it was worn out, yes?

DOMNIC Yes

[28] The governor linkage is one which connects the governor to the fuel lever of the engine. It does not form part of the governor. The governor linkage is an external part of the engine. All the witnesses, PW1, PW5 and PW7, who testified in this matter agreed that the threads of the governor linkages are not visible to the naked eye and cannot be inspected visually.

[29] It is also pertinent to note that Niigata Service Manual (the engine manufacturer's manual) does not provide specific guidance on how frequently the threads of the governor linkages should be inspected and or changed. It is unclear whether the damaged or deteriorated threads of the governor linkage could have been identified during the governor's overhaul or if the engine had been overhauled.

[30] PW7 explained during his cross-examination that the governor's linkage will only be opened during overhaul if there are any clearances or when there are suspicions on the linkage. Threads of linkages, according to PW7 will not be subjected to inspection unless there is suspicion:

AK Now, as far as, I'm going to put it to you that the fact that the linkage was worn out is clear-cut evidence that it was a wear and tear issue which the overhaul at 15,000 would have picked up had it been done.

DOMNIC No, I disagree.

AK Can you explain why you disagree?

DOMNIC *Because at 15,000, let's say that they did the overhaul at 15,000, they wouldn't have opened up the linkage.*

AK Why not?

DOMNIC *Nobody does it. Manual, as in overhaul, major overhaul. There's nobody actually goes and touch the linkage, it's ok, if he opens up the linkage to test it there.*

AK Then when is it ever replaced?

DOMNIC *It's only replaced when you find something wrong with the linkage. Then you'll find the linkage. If you see the manual, there is no manual, there's no any manual that I know of which says that you have to open up the linkage.*

AK Are you suggesting that that's like a black hole in the engine which nobody touches ever until something happens?

DOMNIC No, it is, ok, basically when it comes to linkages for any type of vessel of whatever size, you check it on a daily basis or a weekly basis, or you have some suspicion you go and have a look at it. You don't open up the linkages because one of the reasons why you do not want to touch the linkages is because these linkages are set, precisely set, especially the linkage to the governor.

AK Ok, so we accept it's a precision equipment.

DOMNIC Yes.

AK Which is, got a very tight tolerance insofar as the thing is concerned, so my question is when, since you say nobody ever touches it, then you mean to tell me the life of an engine which may amount to 50,000 hours, nobody has ever looked into it?

DOMNIC *Like I said, it's not an exact interval to, that, it's not an exact timing (00:16:55) you have to open it up. What I'm saying is you will, you open it up when you get suspicions about the linkage, when you have, like when you notice there's replay (00:17:09), when you notice that the engine RPM it keeps, how to say –*

AK *Hunting?*

DOMNIC *Hunting, fluctuating.* (emphasis added)

[31] The defendant's expert, DW1 also testified in cross-examination that the worn-out linkage would not have been discovered during a governor's overhaul and could have only been discovered if an engine overhaul was done.

SEOW So, yes. And linkage is under engine, ok. Because all the parts is under engine, not under governor. You could see because these two parts, you know. So, they will find out this was worn. That's my answer.

JUDGE Yes. So, your position really is that but you have maintained this is that your position really is as I understand it that if you overhaul the governor, you would not have discovered the issue with the linkage and the spring pin, that's your answer?

SEOW Yes.

JUDGE **You can only discover it if you overhaul the engine, that's what you're saying?**

SEOW **Yes.**

JUDGE **But that's not what is reflected in your opinion in your report, yes?**

SEOW **Yes.** (emphasis added)

[32] Whilst there are disagreements between the experts as to whether the worn-out linkage could have been discovered if the engine had been overhauled, the fact remains that the worn-out thread of the linkage was not visible to any naked eye inspection. In addition, both the experts agreed that only if there are reasons to suspect the governor linkage would the same be opened up for inspection.

Significance Of Jubilee Clip

[33] Before this court, Mr Hermansyah, the Chief Engineer, previously on board, admitted to having fixed the Jubilee Clip to the governor's linkage. He testified that he had noticed clearances and hunting in the governor's operation, which led him to fit the Jubilee Clip. After doing so, the fluctuation or hunting in the governor immediately ceased. However, it is significant to note that Mr Hermansyah did not inform anyone about this action, nor did he document the incident in any of the engine room logs.

[34] The use of the Jubilee Clip to secure the emergency stop device was in fact one of the agreed points between PW7 and DW1 pertaining to the probable cause of the overspeeding of the engine and the subsequent explosion.

[35] However, despite having signed a document on the morning he was scheduled to testify as a defendant's witness, upon taking the witness stand, DW1 testified under oath that the malfunction of the emergency stop device was not attributable to the Jubilee Clip fitted to it. DW1 further stated that the Jubilee Clip "serves no purpose" at all to the whole incident.

SS Ok. Now, would you agree with me that the reason why the emergency stop device was not triggered, based on your report, Mr Seow, it's because there was a jubilee clip used to secure the emergency stop device to the fuel control rack? Do you agree with me?

SEOW No.

SS No.

JUDGE Sorry, your question?

SS *My question, My Lord, is the reason why the emergency stop device was not triggered based on your own report is because there was a jubilee clip used to secure the emergency stop device to the fuel control rack. Agree or do not agree? He said he does not agree.*

SEOW *No.*

JUDGE So, you are saying that the emergency stop device did not function or was not triggered, and that was not because of the jubilee clip. Is that correct? Not because of it?

SEOW No.

SS *So, why didn't it trigger? Why? If you say it's not because of the jubilee clip, then what caused the emergency stop device to not trigger?*

SEOW *Because the linkage was broken. The thread was worn and the link just dislodged.*

SS No. That is a different part. I'm talking about the emergency stop device. You understand?

SEOW Yes.

SS Yes. So, would you agree with me that it was because of the jubilee clip?

SEOW No.

JUDGE It's not because of the jubilee clip. That is his evidence.

SS Yes. That's his evidence, My Lord.

JUDGE Yes. And so, what are you putting to him?

SS *I'm putting it to him, My Lord, that the emergency stop device did not trigger because there was a jubilee clip which was used to secure the emergency stop device.*

JUDGE And you disagree?

SEOW I don't agree, no.

JUDGE And you are saying the emergency stop device was not triggered because of what? Because of the thread, right?

SEOW Yes.

JUDGE Because of the thread?

SEOW Because of the thread, yes.

JUDGE Yes.

SS Now, in your report, I'm referring to page 520 at 7.0. Are you with me, Mr Seow?

SEOW Yes.

SS Third paragraph it reads as, "The thread connecting the governor fuel control rack" -

JUDGE Sorry, Dato' Satha. I'm just trying to understand your position. *"Based on your report, the jubilee clip did not cause the emergency stop device from being triggered." That's what you're saying? "It was not because of the jubilee clip. It was because of the thread being worn out."*

SEOW Correct.

JUDGE Yes. What is the significance of the jubilee clip being used in this case? Does it even contribute to the accident?

SEOW *It serves no purpose.*

JUDGE "It serves no purpose."

SEOW I didn't know why it was there. I saw it, that's why I put it in the report.

JUDGE "Serve no purpose"?

SEOW It's not part of the engine anyway. It's something out of nowhere. It's not part of the engine.

JUDGE And I just heard from Mr Domnic just now that if you see a jubilee clip in the linkage just now, "it will be a big no-no," he said.

SEOW Exactly. If I'm a superintendent, sure it's something wrong. But when I went there, whole thing exploded. I saw it there. The engine already exploded.

JUDGE But if the jubilee clip served no purpose, then why should it be a big no-no? I mean, it doesn't affect the engine performance or the governor's linkage performance, right?

SEOW No, the whole problem was one linkage thread. So, the thing came out, then it went over-speed.

JUDGE *So, the jubilee clip has nothing to do with all these things?*

SEOW *No, but because it was present there. I don't know why it was there. That's why I put in my report. I saw it. It was a fact that it was there.*

JUDGE Ok. (emphasis added)

[36] DW1's oral testimony contradicted his own report. In fact, DW1 also testified that the signature in the report purporting to be his signature is not his. Based on the aforesaid, this court is minded to discount DW1's evidence entirely.

[37] Nevertheless, what is important is that there is no dispute that by applying the Jubilee Clip to the governor linkage, Mr Hermansyah had arrested the fluctuation or hunting issue with the governor. However, unless this was reported to the plaintiff, the fluctuation or hunting issue would not be made known to the plaintiff at all. Such hunting issue, as testified by PW7, would indicate to the plaintiff that there could be something wrong or suspicion with the governor linkage.

[38] This is the basis for the defendant's contention that the plaintiff has breached the warranty and its duty to exercise due diligence.

Effect Of Breach Of Warranty

[39] Pursuant to s. 5 of the Civil Law Act 1956, the English Marine Insurance Act 1906 applies to marine insurance contracts in Malaysia. More specifically, s. 5 of the Civil Law Act 1956 provides that the law applicable with respect to marine insurance is the law as would be administered in England as of 7 April 1956. This means that the applicable statute relating to marine insurance that applies to Malaysia is the Marine Insurance Act 1906 and not the current UK Insurance Act 2015. The said s. 5 is reproduced below:

> **Application of English law in commercial matters**
>
> 5. (1) **In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia** other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, **marine insurance,** average, life and fire insurance, and with respect to mercantile law generally, **the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act,** if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
>
> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law. (emphasis added)

[40] The relevant sections relating to warranties in the Marine Insurance Act 1906 are contained in ss. 33 to 35 of the Act. They are reproduced below:

> **Nature of warranty**
>
> 33(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
>
> (2) A warranty may be express or implied
>
> (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

When breach of warranty excused

34(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

Express warranties

35(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

[41] The effect of a breach of warranty is settled law, encapsulated in the House of Lords, decision in the case of *The Good Luck* [1992] 1 AC 233.

[42] Lord Goff, with whom other members of the House of Lords concurred, started with s. 33(1) of the Marine Insurance Act 1906 which speaks of "a promissory warranty … by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts".

[43] Section 33(3) provides that if a warranty is not "exactly complied with", "then, subject to any express provisions in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date".

[44] "Those words", said Lord Goff, "are clear, they show that discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract of insurance as at an end … s. 33(3) of the Act reflects what has been described, in successive editions of *Chalmers' Marine Insurance Act 1906*, as the inveterate practice in marine insurance of using the term 'warranty' as signifying a condition precedent."

[45] Lord Goff further held, "the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability or the further liability of the insurer. This, moreover, reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risk provided that the warranty is fulfilled."

[46] Thus, in insurance law, a warranty is a term that must be strictly complied with. In *De Hahn v. Hartley* [1786] 1 TR 343, Lord Mansfield stated that "it is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist unless it be literally complied with".

[47] Similarly, Lord Eldon LC remarked in *Newcastle Fire Insurance Co v. Macmorran & Co* [1815] 3 Dow at 262, that "it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with – if immaterial, that immateriality may be enquired into and shown; but if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore, the materiality or immateriality signifies nothing. The only question is as to the mere fact."

[48] The upshot is that the materiality of the breach of the warranty is immaterial for consideration in respect of a claim that arises subsequent to the breach of the warranty. This is because once there is a breach of the warranty, the insurer's discharge from liability is automatic and not at all dependent upon any decision by the insurer to treat the contract as at an end.

[49] A direct causal link between the breach and the ultimate loss is not required. That is, the relevant test is not whether the non-compliance actually caused or contributed to the loss which has been suffered. The test is this – was there a breach of warranty? If there was, then the defendant, as the insurer, cannot be liable to the plaintiff, as policy holder, on the claim. Consequently, there can be no claim that is payable by the insurer on the policy in respect of liability arising post the breach.

Warranty In Present Policy

[50] In this instant case, the initial policy and the renewed policy are subject to the Institute Time Clauses, with liability for breaches under cl. 8 expressly excluded. Additionally, the Institute Machinery Damage Additional Deductible Clause (cl. 1.10.83) is also incorporated. Both policies are at all times and without exception subject to the following warranty:

> Warranted Vessel hereby insured is properly and reasonably maintained, equipped, kept-up, officered and manned during the currency of the policy. In the event of loss, the survey report issued by the corporation's approved surveyor shall be taken as evidence insofar as to whether this Warranty has been observed.

[51] The Institute Time Clauses (ITC) are standardised insurance clauses used in marine insurance policies to define the scope of coverage for ships, cargo and other marine interests over a specified period. These clauses are issued by the Institute of London Underwriters (ILU) and are widely used in international shipping and marine insurance.

[52] To my mind, the natural and ordinary meaning of the words 'properly and reasonably maintained, equipped, kept-up, officered and manned' means that scope of the warranty is confined to the obligations by the plaintiff to timely and adequately maintain the tug, including repairs, inspections and servicing of her engine and equipment consistent with the maritime industry standards and to ensure that the tug carries all necessary equipment in working order needed for the operation of the tug and required by law and industry practice. The tug and her equipment must be kept in operational readiness and are sufficiently officered and manned by properly certified and competent personals.

[53] In this regard, the defendant contends that the same was breached when the plaintiff failed to overhaul the port side main engine when it had reached its 15000 running hours mark.

[54] According to the main engine running hours log record, as of the time of the explosion on 25 May 2019, the vessel's port side main engine had an average of 19,492 running hours since its last overhaul in July 2016. Thus, based on the maintenance records, the port side main engine had already exceeded the engine maker's requirement of 15,000 running hours.

[55] The fact that the plaintiff did not overhaul the engine when the 15,000 running hours was exceeded is not disputed. The fact that the engine had 19,492 running hours between its last overhaul and the date of the incident is also not disputed.

[56] The plaintiff, however, contends that the 15,000-hour mark was a mere recommendation and not a requirement. The plaintiff further contends that whilst it did overhaul the governor which is linked to the main engine sometime in 2018, there was no need for the main engine and the governor to be overhauled at the same time.

[57] Notwithstanding the aforesaid, it is undisputed that the main engine and the governor were concurrently overhauled in 2016. In fact, the plaintiff's expert agrees that this would be the way to do it – "in a perfect world":

AK: Ok, now in, you're aware that in 2016 the owners actually did an overhaul of the governor and the engine at the same time.

DOMNIC: Yes.

AK: Yes, now I will put it to you that that is the prudent way of ensuring that all elements of the engine are dealt with appropriately at the same time.

DOMNIC: In perfect world.

AK: In a perfect world?

DOMNIC: Yes.

[58] In this case, the plaintiff explained the reason why in 2018 the governor and main engine were not overhauled concurrently in the following manner:

> AK Alright. Now, as far as the governor, I agree with you it's small. It's a couple of days job at best and can be done without much difficulty. And I'm going to put it to you that as for as the main engine is concerned, your quite right, it is a big job. An overhaul. You have to strip the whole thing and it will take days, if not weeks. Now, I'm going to put it to you the reason why you did not do the main engine but purportedly that the governor overhaul is because you did not want to disrupt the operations of the vessel which was under charter to a particular commercial port. Do you agree?
>
> RAVI Yes, Yang Arif

[59] In other words, the plaintiff had made a conscious decision not to overhaul the main engine in 2018 together with the overhaul of the governor because the plaintiff did not want to interrupt the operation of the vessel which was under charter at the material time.

[60] Accordingly, while the governor was overhauled in 2018, the governor linkage was not. This was confirmed by PW4.

> JUDGE: So, in 2018 when you all were servicing the governor -
>
> RAVI: Yes, Yang Arif.
>
> JUDGE: It did not include the linkage?
>
> RAVI: No, Yang Arif.
>
> JUDGE: Alright, thank you.

[61] Further, the testimony of the plaintiff's own witness confirmed that in servicing the governor, the governor linkage itself would not be serviced:

> AK: And I also put it to you so-called servicing the governor by itself even if it's true in 2018 by TGS Governor was insufficient to discover at all because on the documents, they never stripped down the parts to actually look at the linkage itself. Do you agree?
>
> RAVI: I agree. To add on to that, the 2018 governor servicing is only carried on the governor itself.
>
> JUDGE: So, in 2018 when you all were servicing the governor -
>
> RAVI: Yes, Yang Arif.
>
> JUDGE: It did not include the linkage?
>
> RAVI: No, Yang Arif.
>
> JUDGE: Alright, thank you.

[62] Instead, the governor linkage would only be looked at visually which means that the thread of the governor linkage would not have been looked at when the governor was overhauled in 2018.

AK: Yes, let me stop you there. You said the governor linkage would have been inspected and found to be in satisfactory condition. Now, so that would be by visually looking at the external portions of the linkage, yes?

DOMNIC: Yes, and -

AK: But the read would not have been looked at, yes?

DOMNIC: Yes.

[63] In fact, even if the main engine were overhauled in 2018, based on PW7's testimony, the governor linkage would also not be opened up:

DOMNIC: Because at 15,000, let's say that they did the overhaul at 15,000, they wouldn't have opened up the linkage.

AK: Why not?

DOMNIC: Nobody does it. Manual, as in overhaul, major overhaul. There's nobody actually goes and touch the linkage, it's ok, if he opens up the linkage to test it there.

[64] The aforesaid means that the plaintiff's failure to overhaul the main engine in 2018 would not have led to the discovery of the sheared thread in the governor linkage and thus would be immaterial to the plaintiff's claim in this case.

[65] However, as I have alluded to above, the materiality of the breach of the warranty is irrelevant for consideration in respect of a claim that arises subsequent to the breach of the warranty. It is trite that when an insured is in breach of a warranty under an insurance contract, an insurer is entitled to avoid liability under the contract for a loss which occurred after the breach of warranty (See: *Suhaimi Ibrahim v. United Malayan Insurance Co Ltd* [1965] CLJU 170; [1965] 1 LNS 170; [1966] 1 MLJ 140).

[66] In other words, in the present case, this court will only need to determine if the warranty has been breached. The fact that the breach may not have led to the discovery of the sheared thread in the governor linkage is of no relevance.

Was The Warranty Breached?

[67] The incident occurred in May 2019, after the port side engine had run passed the 15,000-hour mark:

(i) the last port side main engine overhaul was conducted in July 2016, with 21,729.46 running hours on that engine;

(ii) the incident occurred in May 2019, with 41,221.78 running hours on that engine; and

(iii) the aforesaid means that the engine had been running for 19,492.32 hours without overhaul.

[68] According to the manufacturer's recommendation, the main engine ought to go under overhaul after running 15,000 hours +/-20%. Notwithstanding the aforesaid, the plaintiff contends that the Niigata Service Manual expressly states under the maintenance and inspection schedule section the following:

> shows generally, however practical maintenance should be varied by application of engine, fuel oil, load, *etc*.

In other words, the 15,000 running hours mark is not to be strictly followed. It all depends on the usage or application of the engine and other factors.

[69] Further, another portion of the Niigata Service Manual expressly states that:

(i) the engine running periods given as intervals between maintenance operations practically depend upon engine availability and therefore, may vary by 20. For instance, the D inspection is 5,000 hours operation which can take place 4,000 to 6,000 hours depending both on the engine yearly running duration and the time at which the engine can be conveniently stopped; and

(ii) **they are defined for a 90% MCR continuous engine operation,** and defined for using light fuel oil, if it is not provided. (emphasis added)

[70] Based on the aforesaid, the plaintiff contends that a plain reading of the engine manufacturer's manual including the maintenance and inspection schedule, reveals that the provisions relating to the 15,000 running hours service interval are framed as guidelines or recommendations, rather than mandatory requirements.

[71] The plaintiff's expert witness testified that the engine manufacturer's manual does not impose a strict requirement for overhauling the engine at every 15,000 hours. The manual allows for flexibility in the maintenance schedule based on operational conditions and actual engine performance. Therefore, the plaintiff submits that failure to overhaul the port side main engine at exactly 15,000 running hours does not amount to a breach of the policy terms, especially when the engine was maintained within acceptable parameters.

[72] The plaintiff led evidence to justify why the port side main engine of Kejora Prosper was not overhauled at every 15,000 running hours as follows:

(i) by PW2, the General Manager of the plaintiff in his witness statement WSPW2 that:

> 34.Q: Why was the Port Side main engine not overhauled at 15,000 running hours?

A: a. **15,000 running hours are Nigata Engine Makers recommendation only when the Main Engines are subjected to 100% load continuously.**

b. Kejora Prosper was in contract and active duty at Westports Malaysia.

c. Kejora Prosper's Port and Starboard Main Engines were working well within the satisfactory operating parameters prior to the incident. (emphasis added)

(note: PW2 later amended 100% load continuously to 90% MCR, maximum continuous rating)

d. Kejora Prosper was never deployed on 100% Main Engine loads continuously during the operation at Westports Malaysia.

e. Regular Watchkeeping was manned and maintained throughout onboard Kejora Prosper prior to incident.

f. Regular Main Engine maintenance carried out regularly prior to the incidents.

(ii) by PW5, the Technical Manager of the plaintiff in his witness statement, WSPW5 that:

33Q: Why was the Port Side main engine not overhauled at 15,000 running hours as per the maker's recommendation as claimed by the Defendant?

A: In general, 15,000 running hours is merely a recommendation and not mandatory. Based on the maker's recommendation, the recommendation can be varied based on application of engine, fuel oil, load and *etc*.

The main engine of Kejora Prosper was running at variable speed and load during operations and was not at maximum usage at all times. In respect of fuel oil, the Vessel consumes Marine Gas Oil (MGO) which is lighter and cleaner compared to Heavy Fuel Oil (HFO).

After considering all these factors, the management including the General Manager and myself decided that both the engines can be overhauled at the upcoming dry-docking which was scheduled sometime in 2021.

(iii) by PW7, the plaintiff's expert witness in his expert's report:

5. The Final Report opined that based on the exceeded Main Engine running hours, that The Owner had not taken sufficient due diligence in the maintenance of the vessel. However, it is construed that the surveyor was not presented or aware of the following:

A

i. The recommended maintenance schedule in the Engine Manufacturers Manual clearly states that the maintenance schedule can be varied according to a number of factors and the optimum maintenance schedule can be varied according to operational conditions and may vary by +/-20%. *It is also stated that the recommended running hours is defined for 90% Maximum Continuous Running or MCR. As "KEJORA PROSPER" is basically operating as a harbour tug. it would be acceptable that the main engines would running at idle speed for at least 50% of the actual recorded running hours, thus the Maintenance Schedule can be extended accordingly.* However, in the Final Report, the maintenance schedule is reflected as rigid mandatory requirements.

B

C

ii. It is also noted that the surveyor had not inquired any clarification from the Owners on the exceeded running hours during the time of survey.

D

iii. It is further noted that to ensure safe operation of both the main engines, the Owners had carried out the overhaul of both Governors, which was carried out on 18 June 2018. The Owners recognizing that the Governor is a vital, sensitive, and precision equipment, carried out the overhaul despite the same running conditions as the main engine. During the overhaul, the Governor linkage would have inspected and found to be in satisfactory condition. (emphasis added)

E

(iv) by DW1 himself in his cross-examination.

MR I'm sorry, Yang Arif. The fifth paragraph, line No. 3, "The unit maintenance to the vessel's main engine system already exceeded the engine maker's requirement of 15,000 running hours." Mr Seow, do you agree with this statement, since you've disagreed with portions of your statements before. Do you agree with this statement?

F

SEOW Yes.

MR Is it a requirement or is it a recommendation by the engine maker to overhaul at 15,000 running hours?

G

SEOW It's a requirement.

MR It's a requirement. Can you point out to this Court where can you find that it is a requirement by the engine maker to overhaul the engine at 15,000 running hours?

H

SEOW I think there's one table somewhere. Let me find. Ok. B1, page 234.

JUDGE B1, 234 is it?

MR Which part, Mr Seow?

I

SEOW You can see under 15,000 hours, governor.

MR Are you talking about the governor's overhaul?

SEOW You can see 15,000 hours.

MR Ok.

SEOW All these things are inside.

MR *Where does it say that it is a requirement that the engine ought to be overhauled pursuant to the maker's requirement?*

SEOW *No, it did not say inside here.*

MR It doesn't say that it's a requirement?

SEOW *I cannot find it mention anywhere.*

MR You cannot find it, ok. Mr Seow, I would like to point out to you, there that it's actually at page 221, the same bundle. Page 221, paragraph 3.5.2. "Periodical inspection and overhaul." There's a table when operated for a long time, 15,000 running hours and it's listed as Item E. I will not go to that. I would like you to just turn to page 219, which is 3.5, "Maintenance and inspection schedule." I'm going to read it out to you. "The content of this section shows generally, however, practical maintenance should be varied by application of engine, fuel oil, load, etc." Does it say that the 15,000 running hours overhauling is a requirement? *Does it say that it's a requirement?*

SEOW *No.*

MR It doesn't say it's a requirement. *So, do you agree with me, by this sentence, the content of this section shows "generally, however, practical maintenance should be varied by application of engine, fuel oil, load, etc" is a mere recommendation by the engine maker.*

SEOW *Yes.*

MR It's a mere recommendation. You agree with that? Thank you. Now, Mr Seow, that was the engine maker's recommendation of overhauling of the engine. Now, I'm asking you for overhauling of the governor. Is it a requirement to overhaul it every 15,000 running hours or is it a mere recommendation by the engine maker?

SEOW It's the same as –

MR Yes, please answer the question. Is it a recommendation or is it a requirement?

SEOW It's a recommendation. (emphasis added)

[73] Based on the aforesaid, the plaintiff contends that there is no breach of the warranty at all.

[74] In this case, the warranty states that the tug should be "properly and reasonably maintained, equipped, kept up, officered and manned during the currency of the policy". It does not state that the plaintiff warrants that it would overhaul the engine in accordance with the Niigata Service Manual.

[75] To my mind, the warranty to 'properly and reasonably maintain' the tug which must necessarily include the engine means that the plaintiff must take care of the engine in a manner that a prudent owner or operator would, ensuring that it remains in good working condition. In this regard, there is no necessity of an absolute compliance with the requirement as stated in the Niigata Service Manual which would otherwise be the case if the warranty stated that plaintiff would overhaul the engine in compliance with the said service manual.

[76] Whilst the manufacturer's recommended overhaul schedule is a good indication of what is considered as proper maintenance, a failure to follow strictly does not automatically mean that the warranty is breached. In this regard, I am prepared to adopt the position held by the English Court of Appeal in the case of *Eridania SpA v. Cia Emiliana De Exportacion SA & Ors and another case, The Fjord Wind* [2000] EWCA Viv 184 that this court should not be too perturbed by the distinction made between 'requirement' and 'recommendation' in relation to the maintenance schedule set out in the Niigata Service Manual. In *The Fjord Wind*, the issue was whether the owners failed to exercise due diligence to make the vessel seaworthy when they failed to follow the recommendation of the engine specialist MAN as to the viscosity of the oil to be used in the engine. The Court of Appeal held thus:

> 17. Furthermore, I do not think we should interfere with the judge's conclusion that the owners' failure to implement M.A.N.'s recommendation to increase the viscosity of the oil and to install another purifier constituted a failure to exercise due diligence. Both these recommendations could affect the longevity of the bearings. Having regard to the gravity of the problem and the fact that no explanation for it had been found, it seems to me that if the owners were to rely on the bearings lasting 10,000 hours, they ought at least to have adopted these recommendations. **I am not impressed by the semantic distinction between a suggestion and a recommendation.** True it is that M.A.N. never put the recommendation in writing. But the judge found, as he was entitled to do, that it had been made and ignored. Not very satisfactory explanation for ignoring it was given. (emphasis added)

[77] As in that case, engaging in semantics as to whether what has been stated by the Niigata Service Manual is mandatory or recommended is unhelpful. Suffice to state that it provides some guidance as to whether the port side engine has been properly and reasonably maintained.

[78] In this case, the 15,000 +/- 20% running hours stipulated in the Niigata Service Manual was expressly defined for 90% MCR or maximum continuous running with light fuel oil. The MCR refers to the maximum power output that the engine can sustain continuously under normal operating conditions without causing damage or excessive wear. It is an important parameter as it defines the engine's safe and reliable long-term performance.

[79] In this case, the Kejora Prosper is a work tug. It conducts port operations on a daily basis. The engine runs 18 hours a day. This is confirmed by the plaintiff's own witness:

AK Alright. So the only difference is whether it's operated continuously for a long time or when it's operated rarely, that's the two criteria that the manual talks about. Your vessels run a long time, in fact I did the maths It works out to about 18 hours a day.

AZLAN Yes

AK 18 hours a day your engine is running, yes

AZLAN Yes

[80] However, there is no evidence adduced before this court that the engine in this case was in fact running at 90% MCR at the material times. The recommended 15,000 running hours +/- 20% interval before overhaul is only applicable if the engine was running at 90% MCR using light fuel. In the present case, whilst there is unchallenged evidence that the plaintiff was using Marine Gas Oil or MGO, which is a light fuel for the running of the port side engine, there is no evidence adduced as to the MCR of the engine when the tug was running.

[81] The Niigata Service Manual states that the main engine should be overhauled after 15,000 running hours but it specifically provides that the running hours may be varied by +/- 20% depending on its operational conditions. I take this to mean that the upper limit of running hours permitted for the main engine would be 18,000 running hours by which time, the main engine should be sent for an overhaul. This is applicable in the case where the engine is running at 90% MCR.

[82] Thus, if the tug was running below the 90% MCR, it stands to reasons that the engine may be permitted to continue running for a longer time before an overhaul is required. In this case, when the port side engine exploded on 25 May 2019, it had been running for 19,492.32 hours since its last overhaul in 2016. This works out to be around an additional 10% more running hours from the maximum 15,000 +/- 20% from the recommended interval for overhaul in respect of an engine running at 90% MCR.

[83] Without any evidence placed before this court that the tug's port side engine was running at 90% or more MCR at the material times, it is not possible for this court to determine that the plaintiff was in breach of the engine manufacturer's recommended overhaul schedule at the time of or prior to the incident.

[84] Significantly, the defendant did not challenge PW2's testimony that the plaintiff had carried out engine maintenance regularly prior to the incident. Further, the tug was properly manned at all times. There is no dispute that both Mr Hermansyah and Mr Yulianto were qualified and competent Chief Engineers at all.

[85] The defendant, who is seeking to rely on the warranty, bears the burden of prove to satisfy this court that the plaintiff has breached the warranty. By merely establishing that the port side main engine has exceeded 15,000 +/- 20% running hours at the time of the incident, without more does not meet the test that on the balance of probabilities, the plaintiff has breached the warranty to properly and reasonably maintained the tug.

[86] The defendant's expert witness did not proffer any evidence at all in respect of the MCR of the tug. This is quite apart from the fact that his testimony has been discredited owing to his inconsistent positions as well as the fact that he has not even signed on the report.

Lack Of Supervision And Monitoring Of Crew

[87] The defendant also contends that the plaintiff has breached the warranty as there is evidence of want of due diligence by the plaintiff in failing to meet the standard of a reasonable shipowner to supervise or monitor the crew, in particular, in relation to the lack of handover report.

[88] In this regard, the defendant refers to the plaintiff's own documents which set out the Chief Engineer's responsibilities as follow:

Responsibilities:

- Carry out servicing in accordance with the planned maintenance system and **manufacturer's technical manuals.**
- Monitor the day to day technical and servicing aspects of the tug
- Maintain tug technical supplies.
- Maintain tug technical manuals.
- Ensure completion and the correct reporting of planned maintenance tasks within his influence.
- Provide technical advice to the Master.
- Stand engine room watch as per watch rotation system in use, depending on condition and status of maintenance repairs.
- Supervise engine room crew when approaching or leaving port, inside port limits and otherwise during manoeuvring and supply routines.
- Manage the adequate availability of fuel, lubricating oil, grease and potable water.
- Manage the loading/discharging of fuel oil, lubricating oil, water. Ensure the quality of such product to be received be in good quality as specified. This task may be delegated to the Second Engineer.
- Maintain and complete accurately all logs including name of contractors and nature of repairs (Engine room Log Book, *etc*)
- Manage and maintain Dock and Repairs lists (D & R list), verify dry docking specifications and prepare requisitions for spares required.

- Manage the performance appraisal of engine room personnel onboard.
- Assist the deck officers during towing operations as required.
- Train KST/MAJU engineering cadets/apprentices during their sea attachment training.
- Prepare a hand over report for the relieving Chief Engineer and discuss details.
- To actively participate in Safety Meetings; (emphasis added)

[89] Amongst those duties is the preparation of a handover report when there is a change of the Chief Engineer.

[90] On this issue, there is no dispute that there was a change in Chief Engineer sometime in May 2019, from Mr Hermansyah to Mr Yulianto.

[91] The defendant contends that there should have been a handover report between Mr Hermansyah and Mr Yulianto by the plaintiff's own stated procedures. Yet, the evidence shows that there was none:

AS Did Hermansyah, the leaving chief officer, prepare a handover report when you took over as chief engineer?

YULI No, there was no handover report.

[92] The handover – including the preparation of the handover report – was supposed to have been supervised by the vessel's technical superintendent, one Mr Shukur:

AS There is also no template or a form, forget that question. Who in the management office would oversee the preparation of this handover report?

YULI My superintendent.

AS Mr Shukur?

YULI Yes.

[93] However, the Technical Superintendent was not present when Mr Yulianto replaced Mr Hermansyah in May 2019.

AS And when Mr Hermansyah, when you took over from Mr Hermansyah, Mr Shukor did not check whether there was a handover report done or not?

YULI Waktu saya handing over sama Mr Hermansyah di atas kapal, Mr Shukor tidak ada.

[94] In fact, the Technical Superintendent was also not present when Mr Yulianto himself was relieved by the next Chief Engineer, a Mr Frans:

AS Who is the main, the main superintendent is still Mr Shukor (00:02:40)?

YULI Mr Shukor.

AS So, was Mr Shukor present during this handover from you to Mr Frans, for example?

YULI Dia tidak hadir. Saya handing over sama Mr Frans di atas kapal dan Mr Shukor ada di ofis.

[95] Indeed, Mr Yulianto himself confirmed from the perspective of a serving crewman, that the plaintiff did not ensure that a proper handover was done when he took over from Mr Hermansyah:

AS Kejora Resources did not ensure that a proper handover was done from Mr Hermansyah and Mr Yulianto, to Mr Yulianto?

YULI Ya, setuju.

[96] The plaintiff did not bother to check if a proper handover was in fact done. In other words, they failed to verify if their own instructions were being carried out:

AK Now, is there any evidence that you asked Hermansyah to do this? Other than this general thing, did you, as the technical, or your super, Syukor, is it?

AZLAN Syukor.

AK Syukor? Your super, say to Hermansyah, let me see this handover report. Is there anything before this, because I don't see anything here.

AZLAN No.

[97] The defendant contends that had there been a handover report, one would assume that Mr Hermansyah would have noted and informed to Mr Yulianto about the port side main engine hunting issue and his use of the Jubilee Clip to arrest the issue. At the very least, this issue would have been highlighted to the plaintiff.

AK And I'll also put it to you had there been proper supervision of the handover by the technical super being on board for at least, you know dialled in by Zoom or whatever necessarily or checking afterwards as to the presence, the very presence of the hand-over form, right, the office would be in a better position to know as to what occurred on hand-over. Do you agree?

RAVI I agree if, Yang Arif, I agree if the outgoing chief engineer has clearly written there is an installation of jubilee clip on the equipment and this information has been relayed upwards, Yang Arif.

[98] In fact, the evidence disclosed that there was no checklist, no briefing and no instruction given by the plaintiff to the crew in the conduct of their duties when there is a handover of duties.

[99] Based on the aforesaid, the defendant contends that the plaintiff has breached the warranty and by reason thereof, the defendant is not obliged to indemnify the plaintiff for its losses.

[100] What the defendant is seeking to do in this case is to read into the warranty not only an implied duty of due diligence but one that complies with the code set by the International Safety Management (ISM). The ISM Code is an international standard established by the International Maritime Organisation (IMO) to ensure the safe management and operation of ships and pollution prevention. Its primary purpose is to promote maritime safety and protect the marine environment by fostering a safety culture within the shipping companies.

[101] However, the ISM Code is not applicable to vessels like Kejora Prosper which are under 500 gross tonnages. More importantly, the ISM Code itself is not a marine insurance warranty unless specifically incorporated into the policy as a warranty.

[102] In this case the warranty is for the plaintiff to 'properly and reasonably maintained, equipped, keep-up, officered and manned' the tug. To my mind, there is nothing in this warranty requiring the plaintiff to ensure that there would be a proper and supervised handover, let alone one that is in accordance with a standard required of a vessel subject to the ISM Code. Under the ISM Code, there is heavy emphasis on documented procedures. However, the same may not be applicable at all for vessels below 500 gross tonnage and based on the prevailing industry standards in Malaysia.

[103] Due to the doctrines of absolute compliance and automatic discharge relating to the breach of warranty in a marine insurance, to my mind, the scope of the promissory obligation that requires absolute compliance must be narrowly construed and any ambiguity in the warranty clause must also be construed against the insurer in accordance with the *contra proferentem* rule. Thus, if the defendant wanted the plaintiff to put in place a proper handover report and protocol, the defendant should have clearly provided so in the warranty (See: *John Pratt v. Aigaion Insurance Company SA* [2008] Court of Appeal Civil (England & Wales) 1314 (EWCA Civ); *Youell v. Bland Welch & Co Ltd* [1992] Lloyd's List Law Reports (1951-) 127 (Lloyd's Rep)).

[104] Indeed, the defendant's criticisms of the plaintiff's lack of any Planned Maintenance System (PMS) where there must be put in place proper maintenance records updated and accessible to incoming Chief Engineer, a thorough Spare Parts Inventory, an express Operational Instructions and Standing Orders from the company to the Chief Engineer on the operation, maintenance and inspection of the engine and a systematic and periodic inspections of the tug by the plaintiff's supervisors as support of its case that the warranty has been breached, is with respect, wholly unjustified and go beyond the ambit of the warranty.

[105] In fact, such contentions by the defendant are also not within its own pleaded defence. More specifically, in the entirety of the defendant's defence (particularly paras. 11 to 15 thereof), the plea of breach of warranty and or lack of due diligence on the part of the plaintiff focused only on the maintenance of the engine.

[106] Accordingly, it is the judgment of this court that the defendant has not discharged its burden of proof that the warranty has been breached and that it is discharged from indemnifying the plaintiff for its losses arising from the incident.

[107] In this regard, I agree with the plaintiff that the explosion was caused by the negligent breach of the duty of care by Mr Hermansyah, the then Chief Engineer, in failing to inform the plaintiff about the overspeed of the port side main engine after he had 'arrested' the problem by fixing the Jubilee Clip on the governor's linkage.

Whether Plaintiff Is Bound By Maphilindo's Report

[108] The warranty provides that in the event of loss, the survey report issued by the defendant's approved surveyor shall be taken as evidence insofar as to whether the warranty has been observed.

[109] To my mind, the aforesaid merely means that the defendant is entitled to rely on Maphilindo's Report as evidence in support of its contention that the warranty had been breached. However, there is nothing in the warranty clause that stipulates that the finding by the defendant's approved surveyor shall be deemed as final and conclusive.

[110] In fact, the contents of the Maphilindo's Report have been put into doubt, given the testimony of DW1 himself as alluded to above.

[111] In any case, the Maphilindo' Report is at best only one of the evidence that this court is required to consider before coming to its finding as to whether the warranty has been breached.

[112] From the deliberation above, it is clear that the defendant has not been able to discharge its burden that the warranty has been breached even after the Maphilindo's Report has been tendered as evidence before this court.

Conclusions

[113] In light of the aforesaid findings of facts, it is the judgment of this court that there has indeed been a breach of policy by the defendant.

[114] In the premises, the plaintiff's claim against the defendant must therefore be allowed with costs. The defendant is to pay the plaintiff the sum of RM4,238,905.23 as indemnity under the policy with interest fixed at 5% per annum from the date of the claim dated 14 January 2020 until full payment.

[115] The defendant is also to pay the plaintiff costs fixed at RM25,000 subject to allocatur.